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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1949

No. 145

BAXTER CREEK IRRIGATION DISTRICT, and W. COBURN COOK, Trustee for the Creditors of Baxter Creek Irrigation District,
Petitioners,

vs.

STATE OF CALIFORNIA, FISH AND GAME COMMISSION OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Table of Authorities Cited

Cases	Pages
Siegel v. Margiotta, 102 F. (2d) 525	3, 4

Statutes	
Bankruptcy Act, Section 25a	2, 4
11 U.S.C.A. 48a	2

Texts	
Collier Bankruptcy Manual, Section 25.01, page 354	3

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Petitioners seek to have the Court grant a Writ of Certiorari to review the Order of the United States Court of Appeals for the Ninth Circuit dismissing petitioners' appeal to the Circuit Court. The Order of the District Court from which the appeal was sought to be taken was entered July 9, 1948. Notice

of entry of the District Court's Order was served on petitioners by respondent July 22, 1948 and proof of service of the Notice was filed July 23, 1948. The Notice of Appeal was not filed by petitioners until August 19, 1948.

The Motion to dismiss the appeal which was granted by the United States Court of Appeals for the Ninth Circuit was made on the ground that the Notice of Appeal was not filed within forty days of the entry of the Order of the District Court from which the appeal was sought to be taken and that this was the maximum time within which an appeal could be taken in Bankruptcy matters. Petitioners opposed the Motion on the ground that the Notice of Appeal was timely since it had been filed within 30 days of Respondent's Notice of Entry of the District Court's Order.

The sole question for review is whether Section 25a of the Bankruptcy Act (11 U.S.C.A. 48a) fixes a maximum time of forty days after the entry of the Order complained of within which to file a notice of appeal.

Petitioners' argument to the contrary is based on the contention that the Act by its terms fixes the time to appeal as thirty days after notice whenever notice of entry of the Order complained of is served on appellant and proof of such service filed within five days after service.

The same contention was advanced by the appellant in the Court of Appeals for the Second Circuit in

Siegel v. Margiotta, 102 F. (2d) 525. As observed by the Court in that case, acceptance of petitioners' contention would mean that "if the appellee waits more than forty days to serve the Order so that the time to appeal has already expired, service will revive the right."

Counsel for petitioners in the Brief in Support of the Petition for Writ of Certiorari, page 10, admits that such a result would be absurd and agrees that once the time for appeal has expired, nothing the parties can do will revive that right. He fails to designate, however, any part of the statute that would make any distinction between acts of the parties done within forty days of entry of the order and acts done after forty days of such entry.

It would indeed be strange if notice to petitioners would give them longer time to take their appeal than they had without it. The purpose of the Section, as stated in *Siegel v. Margiotta,* was "probably to promote notice of entry to the other side; such a construction would make it unlikely; unless it were made within ten days."

Petitioners' reference to statutes providing for the running of the time of appeal from the time of serving notice is not helpful. The question whether the statute fixes a maximum time of appeal apart from such notice is not involved in those statutes. As stated in *Collier Bankruptcy Manual,* Section 25.01, page 354, under the Bankruptcy Act the *maximum* appeal time is forty days but "by serving notice himself

upon his adversary, the successful party may shorten the appeal time, but in no case more than ten days."

There is no conflict in the Circuit Courts of Appeal on this question. The conclusion of the Court of Appeals for the Second Circuit in *Siegel v. Margiotta, supra,* was followed by the Court of Appeals for the Ninth Circuit in this case. (170 F. (2d) 1021.)

By *per curiam* decisions of two Circuits, Section 25a of the Bankruptcy Act has been construed as fixing a maximum appeal time of forty days. Respondent submits that this is the only reasonable construction that can be given this Section and that the Petition for Writ of Certiorari should be denied.

Dated, Oroville, California,
July 27, 1949.

Respectfully submitted,
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